STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JEFFEREY L. NORMAN, Charging Party, v. NATIONAL EDUCATION ASSOCIATION-JURUPA, Respondent.	Case No. LA-CO-1571-E PERB Decision No. 2356 February 14, 2014

Appearances: Jefferey L. Norman, on his own behalf; California Teachers Association by Michael D. Hersh, Staff Counsel, for National Education Association-Jurupa.

Before Huguenin, Winslow and Banks, Members.

DECISION[1]

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Jefferey L. Norman (Norman) from the dismissal (attached) by the Office of the General Counsel of Norman's unfair practice charge. The charge, as amended, alleged that the National Education Association-Jurupa (NEA-J) violated the Educational Employment Relations Act (EERA)[2] by breaching its duty of fair representation and retaliating against Norman because of protected activity. Norman alleged that this conduct constituted a violation of EERA sections 3543.6(a), 3543.6(b) and 3544.9.

[1] PERB Regulation 32320(d) provides, in pertinent part: "Effective July 1, 2013, a majority of the Board members issuing a decision or order pursuant to an appeal filed under section 32635 [Board Review of Dismissals] shall determine whether the decision or order, or any part thereof, shall be designated as precedential." Having met none of the criteria enumerated in the regulation, the decision herein has not been designated as precedential. (PERB Regs. are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

[2] EERA is codified at Government Code section 3540 et seq.

The Office of the General Counsel dismissed the charge, as amended. The Office of the General Counsel determined that, of the conduct alleged only in the initial charge, none of it occurred within six months of the charge filing date, and the Office of the General Counsel found it to be untimely. Of the conduct alleged in the amended charge, the Office of the General Counsel determined that Norman's termination on January 18, 2013, did not trigger the statute of limitations, but rather when Norman knew, or should have known, that further assistance from the union was unlikely. All of the alleged wrongful conduct by NEA-J occurred during the November 2011 through January 2012 time period. Norman alleged that in January 2012, NEA-J said the grievances were "done," and it is therefore clear that Norman knew in January 2012, that NEA-J would no longer assist Norman in the issues raised in the instant charge. The instant charge was filed on March 18, 2013, which is more than six months after January 2012. On those grounds, the charge was dismissed.

The Board has reviewed the record in its entirety and has fully considered the appeal and the response thereto. Based on this review, we find the warning and dismissal letters to be well-reasoned and in accordance with applicable law. Accordingly, the Board hereby adopts the warning and dismissal letters as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CO-1571-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Huguenin and Banks joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2809
Fax: (818) 551-2820

August 12, 2013

Jefferey L. Norman

Re: *Jefferey L. Norman v. National Education Association Jurupa*
Unfair Practice Charge No. LA-CO-1571-E
DISMISSAL LETTER

Dear Mr. Norman:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 18, 2013. Jefferey L. Norman (Norman or Charging Party) alleges that the National Education Association Jurupa (Union or Respondent) violated sections 3544.9 and 3543.6 of the Educational Employment Relations Act (EERA or Act)[1] by failing to fulfill the duty of fair representation. On March 27, Charging Party filed a First Amended Charge.

Charging Party was informed in the attached Warning Letter dated June 12, 2013, that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, Charging Party should amend the charge. Charging Party was further advised that, unless Charging Party amended the charge to state a prima facie case or withdrew it on or before June 27, 2013, the charge would be dismissed. On June 19, 2013, the parties agreed to place the charge in abeyance. On July 19, 2013, the Union requested that the charge be taken out of abeyance. The undersigned Board agent contacted the Charging Party and provided until August 2, 2013 for the Charging Party to file an amended charge. On July 30, 2013, Charging Party filed a Second Amended Charge.

The June 12, 2013 Warning Letter explained that allegations that Union president, John Vigrass, breached the duty of fair representation by failing to relay information to Charging Party; by failing to respond to District allegations against Charging Party; by failing to verify or investigate the truth of District allegations against Charging Party; and by failing to pursue Charging Party's grievances against the District in November 2011 through January 2012, were untimely because the statute of limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) When a Charging Party alleges

[1] EERA is codified at Government Code section 3540 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

that a union breached its duty of fair representation, the limitations period begins to run when the charging party knew, or should have known, that further assistance from the union was unlikely. (*IFPTE, Local 21, AFL-CIO (Hosny)* (2011) PERB Decision No. 2192-M.)

In the July 30, 2013, amended charge, Charging Party states in part:

> The union president John Vigrass decided on January 18, 2012 that the grievances that I submitted in reference to the violations by Jurupa USD of the collective bargaining agreement [CBA] were going to be terminated by him. Although two (2) months prior on November 30, 2011 he exclaimed in a letter that he wrote to the district's superintendent of personnel Tammy Elzig, "*due to the circumstances involved the Association wishes to respond as well. The treatment and handling of Mr. Norman's situation has* ***significant ramifications toward our unit as a whole, and the Association wishes to strongly object to the District's actions as both discretionary and in violation of the Collective Bargaining Agreement.***"
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> ...
>
> [W]hen the union chooses to show a voluntary disregard for reasonable care, it no longer can be considered "mere negligence."
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> ...
>
> "[Vigrass'] inaction was without rational basis and devoid of honest judgment."
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> ...
>
> Mr. Vigrass receives the assistance of Citrus belt uni-serve and CTA staff persons capable of explaining to the union president that the union can only help Mr. Norman as his "exclusive representative" under the negotiation and administration of the "CBA." Once the grievances are denied by the union, MR. NORMAN NO LONGER IS OWED REPRESENTATION BY THE UNION! Anything that happens from that point forward is outside the realm of the contract, is considered 'extra,' and now I must find a way to defend myself without the union who gladly accepts my dues and does nothing to protect my livelihood.
>
> In a declaration sent to PERB by attorney Mr. Richard Ackerman on case LA-CO-1564[-]E, Mr. Ackerman states that Mr. Vigrass was openly hostile toward Mr. Norman as was Mr. Ed Sibby, who verbally confronted Mr. Ackerman in a meeting held at the district office November 10[,] 2011. Mr. Sibby told Mr. Ackerman to stay out of the business of the union....
>
> ...

> PERB is precluded under of the statutes it enforces from issuing a complaint based upon conduct that occurred more than six months prior to the filing of the charge. However, in a termination case, the Board has held the statute of limitations begins to run when an employee is actually terminated, not when the employer displayed its clear intent by giving the employee notice of the termination. (*Regents of the University of California (Davis)* (2004) PERB Decision No. 1590-H; [a]lso see *Lemoore Union High School District* (1982) PERB Decision No. 271.)
>
> I received my clear intent of notice to dismiss on April 2, 2012. I was actually terminated January 18, 2013. I filed LA-CO-1571-E on March 18, 2013. In PERB [D]ecision 1590H the [B]oard references Sarka, and adopted a new rule regarding the commencement of the statute of limitations in discrimination cases.

In sum, Charging Party asserts in the amended charge that the statute of limitations that applies when an employer terminates an employee in alleged violation of EERA should similarly apply to his allegation that the Union violated its duty of fair representation. Charging Party provides no legal authority or rationale explaining why the statute of limitations applicable to an employer respondent that allegedly terminates an employee in violation of EERA should also apply where the respondent is an exclusive representative that allegedly violates the duty of fair representation. The undersigned Board agent is unaware of any such precedent wherein the statute of limitations runs from the date of termination in a charge alleging a duty of fair representation violation. It is implausible that the statute of limitations in a duty of fair representation allegation should depend on and commence according to the conduct of the employer, rather than the conduct of the exclusive representative. As stated in the June 12, 2013, Warning Letter, the applicable statute of limitations commences when the Charging Party knew, or should have known, that further assistance from the union was unlikely. (*Gavilan Joint Community College District*, *supra*, PERB Decision No. 1177; *IFPTE, Local 21, AFL-CIO (Hosny)*, *supra*, PERB Decision No. 2192-M.)

In the instant charge, the Charging Party alleges the union violated the duty of fair representation by failing to relay information to Charging Party, by failing to respond to District allegations against Charging Party, by failing to verify or investigate the truth of District allegations against Charging Party and informing Charging Party on January 18, 2012, that the Union decided to terminate Charging Party's grievances concerning the alleged violations of the CBA by the District.[2] All this alleged wrongful conduct by the Union

[2] It should be noted that Charging Party raised in Unfair Practice Charge No. LA-CO-1564-E (filed on February 4, 2013) allegations that the Union violated the duty of fair representation during the time period from November 2, 2011, when the District placed Charging Party on administrative leave, through September 5, 2012, when the Office of

occurred during the November 2011 through January 2012 time period. Charging Party alleged that in January 2012, the Union said the grievances were "done," and it is therefore clear that Charging Party *knew* in January 2012 that the Union would no longer assist Charging Party in the issues raised in the instant charge. The instant charge was filed on March 18, 2013 which is more than six months after January 2012. Therefore, the charge is hereby dismissed based on the facts and reasons set forth here and in the June 12, 2013 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations, Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs., tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32635, subd. (b).)

Administrative Hearings granted the CTA General Legal Services Attorney's request to be relieved as Charging Party's counsel in the District's dismissal hearing against Charging Party. In Unfair Practice Charge No. LA-CO-1569-E (filed on March 13, 2013), Charging Party alleged the Union violated the duty of fair representation because the District's legal counsel allegedly represented Mr. Vigrass at a deposition conducted in a civil suit against the District. Unfair Practice Charge No. LA-CO-1569-E also alleged the Union violated the duty of fair representation because it entered into a hold-harmless clause in the CBA.

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, § 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

M. SUZANNE MURPHY
General Counsel

By _____
Mary Weiss
Senior Regional Attorney

Attachment

cc: Michael Hersh, Staff Counsel, California Teachers Association

PUBLIC EMPLOYMENT RELATIONS BOARD

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700 N. Central Ave., Suite 200
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Telephone: (818) 551-2809
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June 12, 2013

Jefferey L. Norman

Re: *Jefferey L. Norman v. National Education Association Jurupa*
Unfair Practice Charge No. LA-CO-1571-E
WARNING LETTER

Dear Mr. Norman:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 18, 2013. Jefferey L. Norman (Norman or Charging Party) alleges that the National Education Association Jurupa (Union or Respondent) violated sections 3544.9 and 3543.6 of the Educational Employment Relations Act (EERA or Act)[1] by failing to fulfill the duty of fair representation. On March 27, 2013, Charging Party filed a First Amended Charge.

FACTS AS ALLEGED[2]

Charging Party is a teacher formerly employed by the Jurupa Unified School District (District) and represented by Respondent. It appears that Charging Party was dismissed from his employment in January 2013.

In his unfair practice charge, Charging Party alleges the District placed him on administrative leave on November 2, 2011 because he moved a student's seat and questioned the student's motivation. Charging Party subsequently filed ten grievances about this incident. Charging

[1] EERA is codified at Government Code section 3540 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

[2] Many of the allegations and attachments in this charge are identical to allegations and attachments provided in Charging Party's Unfair Practice Charge Nos. LA-CO-1564-E and LA-CO-1569-E. Be advised that the Board has held that "the pursuit of similar charges based on essentially the same circumstances...may be considered an abuse of PERB's process," and that, "[t]he repeated presentation of charges based on circumstances which have been considered by the Board in related cases previously suggests an abuse of that process." (*Los Rios College Federation of Teachers/CFT/AFT/Local 2279 (Deglow)* (1997) PERB Decision No. 1238, quoting *Los Rios College Federation of Teachers (Deglow)* (1996) PERB Decision No. 1133.)

Party learned in December 2011, that the student incident was apparently no longer of interest to the District and the District began to justify the administrative leave based on the fact a parent had filed a complaint which led to an investigation. The union president, John Vigrass (Vigrass), never told Charging Party that the District was no longer holding Charging Party accountable for the student incident and was instead justifying its actions based on an investigation precipitated by a parent complaint.

CTA/NEA responded to the District's allegations against Charging Party, apparently on or about November 28, 2011, without investigating them or making sure the allegations were verified under penalty of perjury. In a deposition,[3] Vigrass testified the union does not participate in the investigation process of a disciplinary charge against an employee. Given this, Charging Party asserts that Vigrass' statement in his deposition that he was "Absolutely" confident in his responses was a "perfunctory statement."[4]

In January 2012, the union said the grievances were "done" and Charging Party asserts Vigrass breached his duty of representation by taking an action that benefited the District. Charging Party states there "is no acceptable reason for NEA-J to approve the termination of my grievances, other than arbitrarily ignoring a meritorious grievance or the processing of a grievance in a perfunctory fashion....Vigrass has proven his incompetence in leadership, his perfunctory, arbitrary, and consistently blatant bad faith behaviors."

In the Amended Charge, Charging Party alleges that in a PERB hearing involving another District employee, Pam Lukkarila, Vigrass was questioned why the District's legal counsel was representing him. Charging Party asserts "how does...Vigrass represent any unit member fairly with his arbitrary attitude?" Charging Party states "we have established that [Vigrass] was represented by Jurupa Unified School District." Charging Party further alleges the District paid more than $555,000 in legal fees between January 17, 2012 and February 19, 2013. Charging Party apparently asserts that the Union spent about $6,000 for his defense and such disproportionate legal resources was unfair. Charging Party further asserts "the unit member receives no support from the union who voluntarily continues to accept union dues from members without providing the representation/advocacy reasonably expected from union leadership. Our union doesn't answer phone calls or emails and brings no resources." Charging Party also states that since January 2013 to the present, "three (3) members of our group have been dismissed by Jurupa USD and the only way to get our union to defend us is to barter with them."

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[3] The deposition was conducted by Attorney Richard Ackerman in Riverside County Superior Court Case Number 2012060681, on January 22, 2013.

[4] Charging Party alleges that at a June 19, 2012, unemployment hearing, Tammy Elzig testified that she did not verify under penalty of perjury, nor did she check to see if others had verified under penalty of perjury, the documents the District's Board relied on in disciplining Charging Party.

Charging Party also asserts that an April 29, 2012 e-mail message from Vigrass to a former co-worker, Chris Gillotte, demonstrates Vigrass' behavior is "not sincere, honest, [and he doesn't] deal fairly with others. He takes an unfair advantage of unit members and makes empty promises to act, that go absolutely nowhere. This is representation that has bad faith intentions. At their whim, they remove themselves from being our exclusive representative. That clearly defines arbitrary behavior on their part."

DISCUSSION

I. Legal Framework

A. Charging Party's Burden

PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." Charging Party may do so by alleging sufficient information that explains the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

The Charging Party's burden includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)

B. Duty of Fair Representation

Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). The duty of fair representation imposed on the exclusive representative extends to grievance handling. (*Fremont Unified District Teachers Association, CTA/NEA (King)* (1980) PERB Decision No. 125; *United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.) In order to state a prima facie violation of this section of EERA, Charging Party must show that the Respondent's conduct was arbitrary, discriminatory, or in bad faith. In *United Teachers of Los Angeles (Collins)*, the Public Employment Relations Board stated:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations omitted.]
>
> A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal. [Citations omitted.]

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a Charging Party:

> must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment.

(*Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332, p. 9, quoting *Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124; emphasis in original.)

With regard to when "mere negligence" might constitute arbitrary conduct, the Board observed in *Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517-H that, under federal precedent, a union's negligence breaches the duty of fair representation "to cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Quoting *Dutrisac v. Caterpillar Tractor Co.* (9th Cir. 1983) 749 F.2d 1270, at p. 1274; see also *Robesky v. Quantas Empire Airways, Ltd.* (9th Cir. 1978) 573 F.2d 1082.)

II. Analysis

In sum, the allegations in the charge are:

- Vigrass never told Charging Party that the District's discipline was based on an investigation stemming from a parent report, rather than the incident regarding Charging Party moving a student's seat and questioning the student's motivation. It appears the failure to relay this information occurred in or about November 2011 through January 2012;
- In or about November 2011, Vigrass responded to the District's allegations against Charging Party without verifying or investigating the truth of the allegations;
- In January 2012, Vigrass ceased pursuing Charging Party's grievances;

- An April 29, 2012 e-mail message allegedly demonstrates failure to provide fair representation.

As stated above, PERB lacks jurisdiction to issue a complaint with regard to conduct that occurred more than six months prior to the date the charge was filed, thus, the allegations listed above will be dismissed as untimely. Allegations concerning conduct occurring within six months before the charge was filed appear to consist of the following:

- Since January 2013, the District has dismissed three members; and
- In or about February 2013, Charging Party learned the District spent $555,000 in legal fees and the Union spent only $6,000.

The timely allegations do not include any information that demonstrates the Union handled any grievances in bad faith or in a way that was discriminatory or arbitrary. (*United Teachers of Los Angeles (Collins)*, *supra*, PERB Decision No. 258.) The allegations do not include sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (*Reed District Teachers Association, CTA/NEA (Reyes)*, *supra*, PERB Decision No. 332.) In other words, it is not apparent that the Union's expenditure of $6,000 in legal fees was irrational or devoid of honest judgment. Similarly, the fact that the District has dismissed three members since January 2013 does not demonstrate the Union's action or inaction was irrational or devoid of honest judgment. Finally, there is no information demonstrating the Union failed to perform a ministerial act that completely extinguished Charging Party's right to pursue his claim.

For these reasons the charge, as presently written, does not state a prima facie case.[5] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with

[5] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

PERB. If an amended charge or withdrawal is not filed on or before June 27, 2013,[6] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Mary Weiss
Senior Regional Attorney

MW

[6] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)